IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia v. Apotex Inc.,*
2022 BCSC 2147

Date: 20221208
Docket: S189395
Registry: Vancouver

Between:

His Majesty The King in Right of the Province of British Columbia

Plaintiff

And

Apotex Inc., Apotex Pharmaceutical Holdings, Inc., Bristol-Myers Squibb Canada, Bristol-Myers Squibb Company, Paladin Labs, Endo Pharmaceuticals Inc., Endo International PLC, Endo Ventures Ltd., Ethypharm Inc., Janssen Inc., Johnson & Johnson, Pharmascience Inc., Joddes Limited, Pro Doc Limitee, The Jean Coutu Group (PJC) Inc., Mylan Pharmaceuticals ULC, Purdue Pharma Inc., Purdue Pharma L.P., The Purdue Frederick Company Inc., Purdue Frederick Inc., Ranbaxy Pharmaceuticals Canada Inc., Sun Pharmaceutical Industries Ltd., Hikma Labs Inc., Hikma Pharmaceuticals PLC, Roxane Laboratories Inc., Boehringer Ingelheim (Canada) Ltd. / Boehringer Ingelheim (Canada) LTEE, West-Ward Columbus Inc., Sanis Health Inc., Sandoz Canada Inc., Teva Canada Innovation G.P.-S.E.N.C., Teva Canada Limited, Teva Pharmaceuticals USA, Inc., Teva Pharmaceutical Industries Ltd., Actavis Pharma Company, Valeant Canada LP / Valeant Canada S.E.C., Bausch Health Companies Inc., Imperial Distributors Canada Inc., Amerisourcebergen Canada Corporation, Kohl & Frisch Limited, Kohl & Frisch Distribution Inc., McKesson Corporation, McKesson Canada Corporation, Nu-Quest Distribution Inc., United Pharmacists Manitoba Inc., Procurity Inc., Procurity Pharmacy Services Inc., Shoppers Drug Mart Inc., Unipharm Wholesale Drugs Ltd., LPG Inventory Solutions, and Noramco Inc.

Defendants

Corrected Judgment: The list of appearances was corrected on the front page on January 23, 2023.

Before: The Honourable Mr. Justice Brundrett

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Place and Date of Hearing:	Vancouver, B.C. September 20–21, 2022
Place and Date of Judgment:	Vancouver, B.C. December 8, 2022

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I. INTRODUCTION

[1] The applicants apply by way of summary trial for an order striking s. 11 of the *Opioid Damages and Health Care Costs Recovery Act*, S.B.C. 2018, c. 35 [*ORA*] as *ultra vires* the Legislative Assembly of British Columbia (the "Legislature") and therefore of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. There are five similarly structured applications (the "Applications") before the Court all seeking the same declaration of constitutional invalidity.

[2] The applicants include Sandoz Canada Inc., Paladin Labs Inc., Endo Pharmaceuticals Inc., Endo International PLC, Endo Ventures Ltd., Sanis Health Inc., Shoppers Drug Mart Inc., McKesson Canada Corporation, and Mylan Pharmaceuticals ULC (the "Applicants"). The Applicants are all defendants in the underlying action, which is a putative class proceeding brought under the *ORA* and the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] by the representative plaintiff, being His Majesty the King in Right of the Province of British Columbia (the "Province"). The Province brings its claim to recover certain opioid-related healthcare costs and damages from defendants who were involved in the manufacturing, marketing, distribution or sale of opioid drugs and products during the relevant time. Many of the Province's claims depend upon the *ORA* to establish a cause of action for a breach of duty or obligation related to an opioid product.

[3] Section 11(1) of the *ORA* authorizes the Province to bring causes of action on behalf of a class consisting of other governments in Canada for the purposes of recovering public health care costs associated with opioid-related wrongs. The proposed class is made up of all federal, provincial and territorial governments that paid healthcare, pharmaceutical and treatment costs related to opioid drugs or opioids products between 1996 and the present (the "Proposed Class"). The presumed inclusion of other governments in the plaintiff class is at the core of these Applications.

[4] The Applicants jointly argue that s. 11 is *ultra vires* the Legislature as being legislation that has the dominant characteristic, in pith and substance, of legislating in respect of property and civil rights outside of British Columbia, contrary to the territorial limits on the legislative competence of the Legislature pursuant to s. 92 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. More specifically, s. 11 is argued to be: (a) contrary to the opening words of s. 92, which limit the legislative competence of the provincial legislatures to matters "[i]n each Province"; and (b) contrary to s. 92(13), which limits the legislative competence of the Legislature in respect of property and civil rights to such matters "in the Province".

[5] In other words, the Applicants argue that s. 11 of the *ORA* does not respect the territorial limits of provincial power by allowing the Province to legislate rights beyond its borders, thereby infringing on the litigation autonomy of foreign governments. In essence, they argue that s. 11 does not respect the "litigation autonomy" of foreign Crowns.

[6] The Province maintains that s. 11(1) of the *ORA* is within its legislative competence under s. 92(14) of the *Constitution Act, 1867* because it relates to the administration of justice in British Columbia. It submits the geographic scope of a provincial legislature's authority under s. 92(14) is as broad as the territorial jurisdiction of the courts within that province. Since provincial superior courts can consider causes of action in other jurisdictions in adjudicating common issues with a sufficient connection to British Columbia, s. 11 is constitutional. In addition, the Province points to the ability of other governments to opt out of a class proceeding under s. 16(1) the *CPA* in the manner and time specified in a certification order.

[7] The Province recently filed its notice of application to certify this action as a class proceeding, and a certification hearing is scheduled for late 2023. Earlier in these proceedings, this Court sequenced the Applicants' challenge to the constitutionality of s. 11 as part of the certification application: *British Columbia v. Apotex Inc.*, 2020 BCSC 412 at paras. 65–81, 94, appeal allowed in part, 2020

BCCA 186. Subsequently, the parties agreed to litigate the constitutional issue prior to the certification hearing, and the Court has acceded to this position.

[8] The Applications are brought pursuant to R. 9-7 of the *Supreme Court Civil Rules*. The parties all agree that this matter is suitable for summary trial. While the record is substantial, it mainly consists of legislative facts which are not challenged. There are no evidentiary disputes. I agree with the parties that this matter is suitable for summary trial.

[9] For the reasons that follow, I dismiss the Applications seeking a declaration that s. 11 of the *ORA* is constitutionally invalid as *ultra vires* British Columbia's legislative jurisdiction.

II. THE "OPT-OUT" MECHANISMS OF THE *ORA* AND *CPA*

[10] As noted, s. 11(1) of the *ORA* allows the Province to bring an action on behalf of a class consisting of one or more of the government of Canada and governments of other jurisdictions in Canada. It provides as follows:

> 11 (1) If the government has commenced a proceeding in relation to an opioid-related wrong and the proceeding is ongoing as of the date this section comes into force,
>
> (a) the proceeding continues in accordance with this Act,
>
> (b) for the purposes of section 4 of the *Class Proceedings Act*, the government may bring an action on behalf of a class consisting of
>
> (i) one or more of the government of Canada and the government of a jurisdiction within Canada, and
>
> (ii) a federal or provincial government payment agency that makes reimbursement for the cost of services that are in the nature of health care benefits within the meaning of this Act,
>
> (c) a procedure completed, and an order made, before this section comes into force continues to have effect unless
>
> (i) it would be inconsistent with this Act, or
>
> (ii) the court orders otherwise, and
>
> (d) a procedure that began but was not completed before this section comes into force must be completed in accordance with this Act.
>
> [Emphasis added.]

[11] Subsection 11(2) provides as follows:

> (2) Nothing in subsection (1) (b) of this section prevents a member of the class described in that provision from opting out of the proceeding in accordance with section 16 of the *Class Proceedings Act*.

[12] This section incorporates the ability of a member of the class to opt out of the proceeding under s. 16 of the *CPA*, which reads as follows:

> 16 (1) A member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

[13] While s. 11 of the *ORA* permits the Province to bring an action on behalf of other governments, s. 16 of the *CPA* provides a court with wide discretion to fashion a certification order which would result in those governments having the ability to opt out of proceedings. The Applicants point to the following opt-out provisions in the *CPA* which they say are central to the "binding" effect of class actions:

- section 8(1)(f) requires that a certification order state the manner in which and the time within which a class member may opt out of the proceeding;
- section 16(1) provides that a member of a certified class may opt out in the manner and within the time specified in the certification order;
- section 19(6)(b) requires the right to opt out be stated in the certification notice;
- section 26 provides that a judgment on the common issues binds class members who have not opted out;
- section 35 provides for the binding effect of a settlement on all class members who have not opted out; and
- section 39(1)(a) provides that where a class member opts out of a certified class proceeding, a limitation period resumes running as against that class member.

[14] The Province submits that an order might provide that any party who has not confirmed a desire to remain in the proceedings by a certain date will be deemed to have opted out. There is no limit in the language of s. 16 that restricts the manner

that a certification judge may specify for a presumed non-resident class member to communicate an intention to opt out.

[15] The Province has delivered its certification materials to the defendants. The original application for certification delivered in September 2020 proposed an effective "opt-in" process for class members to elect whether to participate in the action. The Province's current litigation plan proposes that class counsel will provide direct notice to each potential class member within 14 days of the certification order and class members will then have 30 days to determine whether they wish to opt into the certification proceeding. The Province advises that it will seek an order at certification that governments who do not positively opt in to this process will be deemed to have opted out.

III. LEGISLATIVE HISTORY OF THE *ORA* AND *CPA*

[16] The parties disagree as to whether provisions of the *CPA*, which pre-date the *ORA*, would allow the Province to advance claims on behalf of foreign governments. In its original claim filed on August 29, 2018 prior to the enactment of the *ORA*, the Province sought to advance a class proceeding on behalf of a class of all "federal, provincial and territorial governments and agencies" that paid healthcare, pharmaceutical and treatment costs related to opioids from 1996 to present. While the action was brought as a proposed class proceeding pursuant to the *CPA*, the Applicants submit that prior to the *ORA* there was no provision in the *CPA* that would authorize the Province to advance claims on behalf of foreign governments.

[17] The *CPA* changed from an opt-in to an opt-out structure as a result of amendments to the *CPA* effective October 1, 2018. The *CPA* now presumptively includes both residents and non-residents in the class of a multi-jurisdictional class action unless they choose to opt out of the proceedings: ss. 4.1(2), 8(1)(f), 16(1), 19(3)(f), 19(6)(b), 26, 35 and 39(1)(a) of the *CPA*. The Attorney General, when introducing the bill making amendments to the *CPA* in 2018 at second reading,

referred to the purpose of moving to an opt-out model as ensuring that as many potential claimants as possible were included as class members:

> The amendments change the legislative framework as it relates to non-residents of British Columbia, moving from an opt-in to an opt-out model. Currently, residents of British Columbia are included as class members unless they choose to opt out of the class proceeding. However, non-residents are not included as members of a class unless they take steps to opt-in. The result of the changes made by this bill will be that all members of a class, whether or not they reside in British Columbia, will be included in the proceeding unless they choose to opt out.
>
> Consistent with access-to-justice principles, this approach will provide a more effective way to ensure that as many potential claimants as possible are included as class members. The amendments will also create consistency and clarity with respect to the certification of multi-jurisdictional class proceedings.

See British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 41st Parl., 3rd Sess., No. 125 (25 April 2018) at 4240.

[18] At committee, the Attorney General again emphasized that the purpose of the amendments was to ensure that people who should be part of a class were not left out:

> That is what it is intended to do, actually, to ensure that nobody is left out of a class action that should be included.

See British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 41st Parl., 3rd Sess., No. 126 (26 April 2018) at 4284.

[19] Turning to the *ORA*, on first reading of Bill 38 (which became the *ORA*), the Attorney General provided background to the *ORA* and the present litigation as follows:

> I am pleased to introduce this bill further to government's announcement on August 29, 2018, that as part of its response to fight the overdose crisis in British Columbia, it had commenced a class action lawsuit against the different manufacturers and distributors of brand-name and generic opioid medications in Canada.
>
> The legal action seeks the recovery of health care costs incurred as a consequence of those companies' actions to market, promote and sell opioid products as less addictive, less subject to abuse and diversion and less likely to cause tolerance and withdrawal than other pain medications. The health

> care costs incurred by the province include those for treatment of problematic use and addiction, the cost of emergency services in response to overdose events, the cost of hospital treatment and other costs.
>
> The legal action that has been commenced is similar in principle to the tobacco litigation that government initiated in 1997. As I indicated on August 29, government is introducing legislation to allow government to proceed in its litigation with opioid manufacturers and wholesalers on a similar basis to that in the tobacco case. This bill will allow government to prove its claim accurately, relying on population-based evidence, and enable litigation to proceed as efficiently as possible while preserving fairness.
>
> Like the existing Tobacco Damages and Health Care Costs Recovery Act, which has governed conduct of tobacco litigation, this bill will establish the new statutory tort of an opioid-related wrong and establish that government has a direct cause of action to recover the cost of health care benefits from those who have committed an opioid-related wrong, as defined.
>
> Recovery, on an aggregate basis, will be facilitated by establishing presumptions with respect to use and causation and by shifting the burden to defendants to prove their activities did not increase opioid use and their products did not cause harm. The act will allow statistical information derived from epidemiological, sociological and other relevant studies to be admissible to establish causation and quantify damages.

See British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 41st Parl., 3rd Sess., No. 150 (1 October 2018) at 5331–32.

[20] At second reading of Bill 38, the Attorney General echoed his earlier comments at first reading, and stated as follows:

> The hon. Minister of Mental Health and Addictions and I are strongly committed to holding the parties who are responsible for this crisis accountable. To that end, we announced on August 29, 2018, that as part of its response to fight the overdose crisis in British Columbia, the government had commenced a class action lawsuit against the more than 40 different manufacturers and distributors of brand-name and generic opioid products in Canada.
>
> …
>
> The original tobacco legislation was amended and strengthened with provisions to shift the burden of proof in relation to certain aspects of causation by requiring tobacco companies to prove that any breach of duty on their part did not contribute to exposure to tobacco products and resulting tobacco-related disease. That was appropriate when the industry continued to maintain that nicotine is not addictive, that smoking was a matter of free choice and that they did not use deceptive practices to encourage people to smoke.
>
> The legislation was tested repeatedly in the courts. And while it was found to be extraterritorial in its reach, the underlying principles of the act were found to be constitutionally sound. Those principles include: the province's entitlement to make a

> claim for recovery of health care costs from companies, the province's right to pursue claims on an aggregate basis, the onus of proof being on the tobacco industry on issues of causation, the apportionment of liability among companies on the basis of market share, and establishing a mechanism for disclosure of health care information while ensuring privacy of individual insured persons.
>
> As I indicated on August 29, government is introducing this legislation to allow government to proceed in its litigation with opioid manufacturers and wholesalers on a similar basis to that in the tobacco case, which has been governed by rules set out in the Tobacco Damages and Health Care Costs Recovery Act, as it is now known. Like the existing Tobacco Damages and Health Care Costs Recovery Act, this bill will establish the new statutory tort of an opioid-related wrong and establish that government has a direct cause of action to recover the health care costs, the cost of health care benefits, from those who have committed an opioid-related wrong as defined.

See British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 41st Parl., 3rd Sess., No. 152 (2 October 2018) at 5389–90.

[21] In the same session, the Hon. Mitzi Dean, then Parliamentary Secretary for Gender Equity, referenced the fact that a proposed class action had already been commenced by the Province at 5397:

> On August 29, 2018, the government commenced an action under the Class Proceedings Act against more than 40 manufacturers, framed as a means to recover health care costs incurred as a result of their alleged wrongdoing. To support this litigation, government also announced its intention to introduce tobacco-style legislation for this fall session – this bill – and that's what we're going to be discussing now.
>
> This bill will allow the province to prove its claim against opioid manufacturers and distributors in a more efficient way.
>
> …
>
> Instead of bringing forward each individual expense record for British Columbians to quantify overall expenses, the legislation will allow government expenditures to be proven by reference to population, based on evidence, statistical data and budget information, to get a big-picture view of the health care costs.

[22] On October 31, 2018, Bill 38 received Royal Assent and came into force on the same date.

IV. LEGISLATIVE CONTEXT: SCHEME OF THE *ORA*

[23] Section 2(1) of the *ORA* grants the government a "direct and distinct" action against a manufacturer or wholesaler to recover the "cost of health care benefits" caused or contributed to by an "opioid-related wrong". This statutory cause of action is provided to the BC government, and only in relation to torts committed in British Columbia or breaches of duty or obligation owed to persons in British Columbia.

[24] Subsequent to the hearing of the Applications, the *ORA* was amended by Bill 34, *Opioid Damages and Health Care Costs Recovery Amendment Act, 2022*, 42nd Parl., 3rd Sess, British Columbia, 2022 (assented to November 3, 2022), to include a right of action against a consultant in addition to a manufacturer or wholesaler. Bill 34 amended the *ORA* by adding s. 2.1 which additionally gives the government of Canada a direct and distinct action against a manufacturer, wholesaler or consultant. Since these amendments were not passed at the time of hearing, I will quote from the pre-amendment language.

[25] Opioid-related wrong is defined in s. 1(1) of the *ORA* in a territorially-limited manner as:

> (a) a tort that is committed in British Columbia by a manufacturer or wholesaler and that causes or contributes to opioid-related disease, injury or illness, or
>
> (b) …a breach, by a manufacturer or wholesaler, of a common law, equitable or statutory duty or obligation owed to persons in British Columbia who have used or been exposed to or might use or be exposed to an opioid product.

[26] Section 4(2) of *ORA* sets out that defendants are jointly and severally liable for the cost of health care benefits, if, among other things, they

> (b) at common law, in equity, or under an enactment…would be held
>
> (i) to have conspired or acted in concert in respect of the breach, [or]
>
> (ii) to have acted in a principle and agent relationship with respect to the breach.

[27] Section 11(1)(b) (quoted above) incorporates the claims of other governments in a class. Other than s. 11, the remainder of the *ORA* is geared towards supporting

the BC government in pursuing the new cause of action related to opioid-related wrongs in the province. The *ORA* provides the BC government (and now also the government of Canada) with procedural and substantive advantages, including:

- the option in s. 2(4) to pursue the recovery of health care costs on an aggregate basis;
- the benefit of certain evidentiary presumptions and other provisions in ss. 2(5)(a) and 3(2) which obviate matters of proof relating to causation;
- the guaranteed admissibility in s. 5 of certain evidence in the action to prove its damages; and
- relief in s. 6 from the ordinary limitation period in pursuing the action.

[28] This scheme closely mirrors the *Tobacco Damages and Health Care Costs Recovery Act*, S.B.C. 2000, c. 30 [*TRA*]. The *TRA* was enacted after the BC Supreme Court struck down an earlier provincial statute related to the recovery of tobacco-related health care costs as being *ultra vires* the legislative competence of the Legislature in *JTI-Macdonald v. AGBC*, 2000 BCSC 312. In response to that decision, new legislation, the *TRA*, came into force in 2001. The *TRA* was drafted to address the concerns about the extraterritorial aspects of the earlier statute: *British Columbia v. Imperial Tobacco Canada Ltd*., 2005 SCC 49 at para. 16 [*Imperial Tobacco*]. Unlike the *ORA*, at the time the *TRA* was introduced, there was no ongoing action against tobacco manufacturers (and thus no need to address the impact of the *TRA* on any existing proceedings). There is no equivalent to s. 11 of the *ORA* in the *TRA*.

[29] The Supreme Court of Canada upheld the *TRA* as constitutional in *Imperial Tobacco.* The Court addressed a constitutional challenge to the validity of the entirety of the *TRA* on three grounds, the first being whether the *TRA* was *ultra vires* the provincial legislature by reason of extraterritoriality. While the Court held that the entirety of the TRA was *intra vires,* one of the central differences between the *TRA* and the *ORA* is that the *TRA* does not contain an equivalent to s. 11 of the *ORA.* In fact, the tobacco litigation did not proceed as a multi-Crown class action at all. The

analysis of the *vires* of s. 11 of the *ORA* is therefore novel and neither contemplated nor resolved by *Imperial Tobacco*.

V. PROCEDURAL HISTORY

[30] The Province originally commenced this putative class action under the *CPA* on August 29, 2018. The original putative class action pertained to alleged healthcare, pharmaceutical and treatment costs related to opioid drugs and products.

[31] After the *ORA* came into force on October 31, 2018, the Province filed an amended notice of civil claim on June 20, 2019 which expressly incorporated s. 11(1)(b) of the *ORA* to bring the proceeding on behalf of the Proposed Class. In subsequent amendments to the pleadings in the putative class action, the Province has maintained the government's reliance on s. 11 to support the class definition. The class definition has remained materially the same as the Proposed Class.

[32] As other provinces introduced equivalent *ORA* legislation, the notice of civil claim was subsequently amended to add a subclass of members for which the Province intends to advance statutory causes of action for opioid-related wrongs based on the class member government's "home" opioid recovery legislation.

[33] The third amended notice of civil claim advances statutory causes of action grounded in the *ORA* and parallel legislation in other provinces on behalf of those governments who have enacted statues that also create a direct cause of action for the recovery of opioid-related health care costs.

[34] The Province advises that, at present, Alberta, Saskatchewan, Manitoba, Ontario, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island have enacted such statutes, although Newfoundland and Labrador's legislation was not yet in force at the time of hearing. The Province's claim continues to advance common law and *Competition Act*, R.S.C. 1985, c. C-34 causes of action on behalf of governments that have not enacted legislation equivalent to the *ORA*. The claim asserts that "[t]he plaintiff relies on section 11(1)(b) of the [*ORA*], which permits the

plaintiff to bring an action pursuant to section 4 of the [*CPA*] on behalf of a class consisting of one or more of the government of Canada and the government of a jurisdiction within Canada."

VI. LEGAL PRINCIPLES

[35] Section 92 of *The Constitution Act, 1867* provides as follows:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> …
>
> 13. Property and Civil Rights in the Province.
>
> 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

[36] The opening words of s. 92 specifically limit provincial legislative authority to matters "[i]n each Province".

[37] Where language in a statute is open to competing plausible interpretations, courts presume constitutional legislative intent and choose an interpretation that supports the law's validity: *Holland v. British Columbia (Attorney General)*, 2020 BCCA 304 at para. 29, citing *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198 at 255, 1957 CanLII 1 and *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 at para. 33.

[38] In *Imperial Tobacco*, the Supreme Court of Canada articulated a two-part analytical framework for assessing whether legislation respects the territorial limits on provincial legislative competence. The first part of the test was explained as follows:

> 36 From the foregoing it can be seen that several analytical steps may be required to determine whether provincial legislation in pith and substance respects territorial limits on provincial legislative competence. The first step is to determine the pith and substance, or dominant feature, of the impugned legislation, and to identify a provincial head of power under which it might fall.

[39] The test in *Imperial Tobacco* was further explained in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 as follows:

> [51] At the first stage of the division of powers analysis, a court must consider the purpose and effects of the challenged statute or provision in order to identify its "pith and substance", or true subject matter: *2018 Securities Reference*, at para. 86; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, at paras. 28 and 166. The court does so with a view to identifying the statute's or provision's main thrust, or dominant or most important characteristic: *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, at para. 31. To determine the purpose of the challenged statute or provision, the court can consider both intrinsic evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as Hansard or minutes of parliamentary committees: *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at para. 53; *Canadian Western Bank*, at para. 27. In considering the effects of the challenged legislation, the court can consider both the legal effects, those that flow directly from the provisions of the statute itself, and the practical effects, the "side" effects that flow from the application of the statute: *Kitkatla*, at para. 54; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 480. The characterization process is not technical or formalistic. A court can look at the background and circumstances of a statute's enactment as well as at the words used in it: *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 18.
>
> [52] Three further points with respect to the identification of the pith and substance are important here. First, the pith and substance of a challenged statute or provision must be described as precisely as possible. A vague or general description is unhelpful, as it can result in the law being superficially assigned to both federal and provincial heads of powers or may exaggerate the extent to which the law extends into the other level of government's sphere of jurisdiction: *Desgagnés Transport*, at para. 35; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457 ("Assisted Human Reproduction Act"), at para. 190. However, precision should not be confused with narrowness. Instead, the pith and substance of a challenged statute or provision should capture the law's essential character in terms that are as precise as the law will allow: *Genetic Non-Discrimination*, at para. 32. It is only in this manner that a court can determine what the law is in fact "all about": *Desgagnés Transport*, at para. 35, quoting A. S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 *U.T.L.J.* 487, at p. 490.
>
> [53] Second, it is permissible in some circumstances for a court to include the legislative choice of means in the definition of a statute's pith and substance, as long as it does not lose sight of the fact that the goal of the analysis is to identify the true subject matter of the challenged statute or provision.
>
> …
>
> [56] Third, the characterization and classification stages of the division of powers analysis are and must be kept distinct. In other words, the pith and substance of a statute or a provision must be identified without regard to the heads of legislative competence. As Binnie J. noted in *Chatterjee v. Ontario*

> *(Attorney General)*, 2009 SCC 19, [2009] 1 S.C.R. 624, at para. 16, a failure to keep these two stages of the analysis distinct would create "a danger that the whole exercise will become blurred and overly oriented towards results". The characterization exercise must ultimately be rooted in the purpose and the effects of the impugned statute or provision.
>
> [Emphasis added.]

[40] The Court in *Imperial Tobacco* described the second step at para. 36 as follows:

> … Assuming a suitable head of power can be found, the second step is to determine whether the pith and substance respects the territorial limitations on that head of power — i.e., whether it is in the province. If the pith and substance is tangible, whether it is in the province is simply a question of its physical location. If the pith and substance is intangible, the court must look to the relationships among the enacting territory, the subject matter of the legislation and the persons made subject to it, in order to determine whether the legislation, if allowed to stand, would respect the dual purposes of the territorial limitations in s. 92 (namely, to ensure that provincial legislation has a meaningful connection to the enacting province and pays respect to the legislative sovereignty of other territories). If it would, the pith and substance of the legislation should be regarded as situated in the province.

[41] I note that while in *Imperial Tobacco* the Court's pith and substance analysis pertained to the *TRA* in its entirety, here the constitutional issue more specifically addresses s. 11(1)(b) of the *ORA*.

[42] Where, as here, a specific provision is challenged, the court will generally first look to characterize the specific provisions that are challenged, rather than the legislative scheme as a whole, to determine whether they are validly enacted: *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at para. 28. In this regard, the Court in *Reference re Genetic Non-Discrimination Act* provided the following additional guidance:

> [30] Identifying a law's pith and substance requires considering both the law's purpose and its effects: *Firearms Reference*, at para. 16. Both Parliament's or the provincial legislature's purpose and the legal and practical effects of the law will assist the court in determining the law's essential character.
>
> [31] Characterizing a law can be a challenging exercise, especially when the challenged law has multiple features, and the court must determine which of those features is most important. Characterization plays a critical role in determining how a law can be classified, and thus the law's matter must be precisely defined:

> see *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, at para. 35; see also *Reference re AHRA*, at paras. 190-91, per LeBel and Deschamps JJ. Identifying the pith and substance of the challenged law as precisely as possible encourages courts to take a close look at the evidence of the law's purpose and effects, and discourages characterization that is overly influenced by classification. The focus is on the law itself and what it is really about.
>
> [32] Identifying the law's matter with precision also discourages courts from characterizing the law in question too broadly, which may result in it being superficially related to both federal and provincial heads of power, or may exaggerate the extent to which the law extends into the other level of government's sphere of jurisdiction: *Desgagnés Transport*, at para. 35; *Reference re AHRA*, at para. 190. Precisely defining the impugned law's matter therefore facilitates classification. But precision should not be confused with narrowness. Pith and substance should capture the law's essential character in terms that are as precise as the law will allow.

[43] When a provision in pith and substance lies within the competence of the enacting body but has the incidental effect of touching on a subject assigned to another level of government, the legislation will not be rendered unconstitutional: *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38 at para. 36.

[44] It must be assumed that the legislator did not intend to exceed their authority. There is a legal presumption as to the existence of the *bona fide* intention of a legislative body to confine itself to its own sphere: *C.B.C. v. Quebec Police Comm*., [1979] 2 S.C.R. 618 at 641, 1979 CanLII 24; *Severn v. The Queen*, 2 S.C.R. 70 at 103, 1878 CanLII 29.

[45] The "presumption of constitutionality" (or more accurately, the presumption of constitutional compliance) arises where the impugned legislation is capable of bearing a meaning that is constitutionally valid: *Desgagnés Transport Inc v. Wärtsilä Canada Inc*, 2019 SCC 58 at para. 28. This presumption is:

> …simply a factor that on some occasions tips the scales in favour of one interpretation over another construction that, in the absence of this consideration, would appear to be the most strongly supported by the rules of statutory construction. If the terms of the legislation are so unequivocal that no real alternative interpretation exists, respect for legislative intent requires

> that the court adopt this meaning, even if this means that the legislation will be struck down as unconstitutional.

See *Ontario v. Canadian Pacific Ltd*, 1995 CanLII 112, [1995] 2 S.C.R. 1031 at 1054.

VII. POSITIONS OF THE PARTIES

[46] The Applicants submit that the pith and substance of s. 11 is to legislate with respect to the property and civil rights (s. 92(13) of the *Constitution Act, 1867*) of governments outside British Columbia. It argues that s. 11 "binds" the litigation choices of provincial Crowns or the federal government if they do not opt out of the class proceeding. It submits that its purpose is to allow the Crown of one province to prosecute causes of action on behalf of sovereign powers of other territories in relation to their health care costs. Further, the direct legal effect of s. 11 is to substantively modify the civil rights of the federal, territorial and other provincial Crowns through the class proceeding.

[47] The Applicants argue that these other governments are put to an "unconstitutional choice": they must either opt out of this class action or be bound by its terms. Requiring another government to make this decision arrogates to British Columbia the extraterritorial authority—which it does not have—to force other equal sovereign members of the federation to determine their litigation strategy on British Columbia's timetable. British Columbia cannot reach into other provinces, force their governments to determine a litigation strategy, and arrogate civil rights belonging to other Crowns without any connection to British Columbia. This violates the territorial limitations on provincial power and undermines the equal sovereignty of the other provinces and federal government. Section 11 therefore ought to be declared of no force and effect.

[48] The Province responds that the pith and substance of s. 11 is s. 92(14), the administration of justice, including the Constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts. It submits that s. 11 simply prescribes the procedural

effect of the *ORA* on this pre-existing action and authorizes the Province to be a representative plaintiff for a class of governments. It does not alter the substantive rights or violate the sovereignty of any foreign government. Further, the *ORA* is directed at impacts within British Columbia, and any extraterritorial impacts are incidental or ancillary to this valid provincial purpose.

[49] The Province submits that the scheme can be interpreted and applied in a way that is constitutional; that being an opt-in model. It submits that the *CPA* already permits the Province to bring an action on behalf of other governments and for other governments to elect to participate in the action. It notes that no Canadian government has sought to challenge the *ORA* on constitutional grounds, and many have adopted their own versions of the *ORA.* The Province argues that the courts should be cautions about invalidating laws when no other government contests their validity. It submits the Applications should be dismissed with costs.

VIII. DISCUSSION

[50] In terms of preliminary comments, I would first note that the Applications have dealt exclusively with the legislative jurisdiction of the Province in relation to s. 11 of the *ORA*. The present Applications do not directly raise the issue of the scope of adjudicative jurisdiction under s. 96 of the *Constitution Act, 1867*, which unlike the authority of legislatures, is continued and not created by the *Constitution Act, 1867.*

[51] Second, I would note that the present Applications do not engage the constitutional ability of a class proceeding to certify a national class action including out-of-province members of the plaintiff class. Such national class actions have been found to be constitutional: *Wilson v. Servier Canada Inc.*, 50 O.R. (3d) 219, 2000 CanLII 22407 at para. 66 (S.C.), leave to appeal ref'd, 52 O.R. (3d) 20, 2000 CanLII 29052 (S.C.), leave to appeal to SCC ref'd, [2001] 2 S.C.R. xii (note), [2001] S.C.C.A. No. 88; *Thorpe v. Honda Canada Inc.*, 2011 SKQB 72 at paras. 123–27.

[52] Further, I note that the Applicants do not question the constitutional authority of the Legislature to legislate in respect of property, civil rights and procedure within the province. Their argument is that the potential extraterritorial impact of s. 11 on

the rights of foreign governments in Canada fails to respect the territorial limits of provincial legislative authority.

[53] The present Applications therefore do not engage with whether the superior court has jurisdiction over foreign class members, whether national class actions are constitutional, or whether the Legislature has the authority to enact the *ORA*. Rather, the present issue is whether s. 11 of the *ORA* is *ultra vires* the Legislature under s. 92 of the *Constitution Act, 1867* because it permits the Legislature to infringe upon the litigation-related rights of other governments.

A. Step 1: What is the pith and substance of the legislation?

1. Characterization

[54] Purpose. The first step in determining whether the impugned legislation is *ultra vires* is to characterize its pith and substance having regard to the law's purpose and effects.

[55] In considering the purpose of s. 11 of the *ORA,* I have considered both the intrinsic and extrinsic evidence put forward by the parties.

[56] Approaching the purpose of the provision with appropriate focus, and in light of the text, greater scheme and context of s. 11 within the *ORA*, I find that the purpose of s. 11(1)(b) is to provide a procedural mechanism to presumptively authorize the Province to act on behalf of governmental parties in this putative class action. This purpose is compatible with the goals of facilitating consistency and clarity in the certification of multi-jurisdictional class proceedings, and ensuring as many potential claimants as possible are included as class members.

[57] I characterize the mechanism in s. 11 as presumptive because, while s. 11(1)(b) of the *ORA* expressly includes other governments as class members, s. 11(2) preserves the ability of a class member to opt out of the proceeding pursuant to s. 16(1) of the *CPA* in the manner and within the time specified in the certification order. The choice of other governments (all sophisticated entities fully capable of positively asserting their litigation choices) to participate or not to

participate in the action is preserved through the discretion of the court to make orders impacting the manner in which members may opt in or opt out of the proceeding.

[58] I characterize s. 11 as procedural because the provision by itself has no substantive effect on the claims of other provinces. Rather, it provides a procedural mechanism to facilitate a process under the *ORA*, the *CPA* and the *Supreme Court Civil Rules* in which the substantive claims of extraterritorial governments may be litigated and pursued in a BC court.

[59] I cannot agree with the Applicants that s. 11(1)(b) unconstitutionally encroaches upon the substantive rights of other governments who do not opt out of the proceeding, based upon the right to opt out being a substantive right: *Johnson v. Ontario*, 2021 ONCA 650 at paras. 14-16.

[60] That class proceeding legislation is purely procedural was confirmed by the Supreme Court of Canada in *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 116: "[t]his Court has repeatedly affirmed that the advantages conferred by class proceeding legislation are purely procedural, and that they do not confer substantive rights". The thrust of *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 101–02, 131–33 is to a similar effect; see also *Lee v. Direct Credit West Inc.*, 2014 BCSC 462 at paras. 39, 49, 54–64. The right to opt out of a class proceeding is a procedural protection: *Currie v. McDonald's Restaurants of Canada Ltd.*, 74 O.R. (3d) 321, 2005 CanLII 3360 at para. 28 (C.A.); *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792 at paras. 90–92; *3113736 Canada Ltd. v. Cozy Corner Bedding Inc.*, 2019 ONSC 2249 at para. 67.

[61] In characterizing the purpose of s. 11, I note that other aspects of the section address procedural matters, including the impact of the *ORA* on the continuation of pre-*ORA* proceedings (s. 11(1)(a)). Section 11(1)(c) provides that procedures or orders made prior to the *ORA* coming into force continue to have effect unless inconsistent with the *ORA.* Section 11(1)(d) provides that if not completed, a procedure that began before the *ORA* came into force must be completed in

accordance with the *ORA.* And s. 11 follows s. 10, which addresses the retroactive effect of the *ORA.* The placement of s. 11(1)(b) within these procedural subsections reinforces its intended procedural quality.

[62] As part of their submissions on the purpose of s. 11, the parties' positions diverge as to the ability of foreign governments to participate in class proceedings under the *CPA*. The Applicants submit that because the *CPA* does not authorize a multi-Crown class action (in part, they argue, because foreign emanations of the Crown are not "persons" under the *CPA*), s. 11(1)(b) was necessary. The Province disagrees, and submits that the action would in any event be authorized under the *CPA* (submitting, in part, that His Majesty is a person at common law). However, I find that I need not resolve this collateral issue as the clear purpose of s. 11 of the *ORA* can be readily discerned.

[63] Effect. The effect of s. 11(1)(b) is to authorize the executive branch of the Province as the representative plaintiff in a class proceeding to efficiently pursue the collective claims of all Canadian governments in one proceeding. The language is permissive. The Province "may" pursue this putative class proceeding on behalf of a class comprising the following government entities:

> (i) one or more of the government of Canada and the government of a jurisdiction within Canada, and
>
> (ii) a federal or provincial government payment agency that makes reimbursement for the cost of services that are in the nature of health care benefits within the meaning of [the *ORA*].

[64] If other governments do not opt out of the proceeding at certification, the existence of s. 11(1)(b) means that the litigation will be conducted under British Columbia rules of court governing the timelines for litigation in British Columbia. This is analogous to the situation in which a foreign government sues in British Columbia as a plaintiff (see e.g. *Fillingham v. Big White Ski Resort Limited*, 2017 BCSC 1702), an intervenor (see e.g. *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247) or as an interested person under the *Constitutional Question Act*, R.S.B.C. 1996, c. 68 (see e.g. *Reference re*

Environmental Management Act (British Columbia), 2019 BCCA 181). In each case, the foreign government is expected to abide by British Columbia procedural rules to advance its action.

[65] The decision in *Reference re Genetic Non-Discrimination Act* directs a court to consider the practical effects of the law in determining its essential character. Practically speaking, the impact of s. 11 is limited to the present proceeding, since it represents the only "proceeding in relation to an opioid-related wrong" commenced by the Province at the time s. 11 came into force. Section 11 of the *ORA* formalizes the class members in relation to the present putative proceeding only. While s. 11(1)(b) authorizes the Province to "bring an action" on behalf of a class that includes other governments, it does not preclude other governments from pursuing causes of action in their home jurisdictions.

[66] The preservation of the ability to opt out is important in assessing the practical effects of s. 11(1)(b). To be sure, provincial legislatures have no legislative competence to legislate extraterritorially. Rather, each province is obliged to respect the sovereignty of the other provinces within their respective legislative spheres: *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40 at paras. 50–51; *Imperial Tobacco* at paras. 26–27.

[67] The fact that governments may be required to take a positive step of opting out makes little real-world difference. The incorporation of the ability in s. 16(1) and other provisions of the *CPA* to opt out of the proceeding pursuant to a court order at certification offers the flexibility that a foreign government will not be required to participate in this action. The foreign governments are all fully capable of exercising their option at certification.

[68] Practically speaking, the opt-out provisions of the *CPA* which are incorporated by reference into the *ORA,* will effectively preserve the choice of foreign governments to participate or not participate in the BC proceeding. The Legislature has created a procedure within this putative class proceeding in which other governments can choose whether or not to participate. I reject the Applicants'

characterization that other governments are put to an "unconstitutional choice" of either opting out of the action or being bound by its terms. The combined effect of the *ORA* incorporating the opt-out ability in the *CPA* substantially negates the Applicants' stated concern about the forced participation of other governments in violation of the division of powers. I find that s. 11(1)(b) does not have the coercive effect ascribed to it by the Applicants.

[69] The nature of class proceedings is also important in measuring the practical effects of s. 11. The current proceeding at this point has not yet proceeded to certification, the stage when a class member may choose to opt out of the proceeding pursuant to s. 16(1) of the *CPA*. As noted in *Das v. George Weston Limited.,* 2017 ONSC 4129 at para. 168, putative class members have no substantive rights that are affected prior to certification:

> The logical fallacy with Loblaws' argument is that pre-certification, the putative class members have no substantive rights that are being affected. They only have putative procedural rights and those rights are rather being created or augmented than affected by the class proceeding. A court order certifying an opt-in or an opt-out class action creates the right to opt-in or to opt-out and does not affect any pre-existing procedural rights of the putative class members, which do not yet exist. What is being determined by the certification process is whether the putative class members will have a right to participate in a class action. A class action certified in Ontario that includes Absent Foreign Claimants would merely serve as a procedural vehicle through which the common issues of many claimants could be adjudicated - if they wish to participate

[70] Hence, the effective legal impact the decision to remain in the proceeding is only felt upon a court's decision to certify the action as a class proceeding under the certification test set out in s. 4 of the *CPA.*

[71] The Applicants further submit that s. 11 of the *ORA* is substantive because it "implicates" limitation periods. I cannot accede to this argument. Section 11 by itself does not address limitation periods. Rather, limitations in class proceedings are addressed by s. 39 of the *CPA*, the purpose of which is to protect potential class members from the winding down of a limitation period until the feasibility of the class action is determined: *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60

at para. 60. The potential effect of s. 39, if any, on the commencement of an action in another province is not an issue presently before this Court.

[72] Overall Characterization. The purpose and effect of s. 11 extends to promoting litigation efficiency by presumptively joining the plaintiff class in one grouping to facilitate the conduct of similar claims in a single proceeding in British Columbia. It does not extend substantive rights that would otherwise not exist.

[73] In light of the above, I find that the pith and substance or dominant feature of s. 11 of the *ORA* is the creation of a procedural mechanism to presumptively authorize the Province to act as a plaintiff in *ORA*-related proceedings on behalf of other Canadian governments. This procedural mechanism is crafted in a way so as to preserve the ability of other Canadian governments to opt out of the litigation at certification pursuant to s. 16 of the *CPA*.

2. Classification

[74] The next step in the analysis is to classify the impugned legislation under an appropriate head of power in either s. 91 or 92.

[75] Section 11 prescribes how the plaintiff's class may litigate its claims under the *ORA.* Indeed, the opening words of s. 11 ("[i]f the government has commenced a proceeding") and the language in s. 11(1)(b) ("the government may bring an action") indicate that the focus throughout s. 11 is on actions started by the Province within British Columbia to enforce a civil cause of action created by the *ORA.*

[76] Given the analysis above, and in light of the finding that the true subject matter of s. 11 of the *ORA* is mainly procedural, I would classify the provision as falling under s. 92(14) of *The Constitution Act, 1867*, the authority of the Province to legislate with respect to "The Administration of Justice in the Province, including … Procedure in Civil Matters". This head of power allows the legislature to legislate in respect of the procedures in the courts of the province: *Caron v. Alberta*, 2015 SCC 56 at para. 79; *Castillo v. Castillo*, 2005 SCC 83 at para. 37, per Bastarache J. (concurring).

[77] Alternatively, I would classify s. 11 as falling within s. 92(13) of the *Constitution Act, 1867*, which provides British Columbia with authority to legislate with respect to property and civil rights in the province, including causes of action: *Imperial Tobacco* at para. 32. However, in light of my reasoning above that s. 11 is procedural and does not affect the substantive litigation autonomy of foreign governments, s. 11 is more appropriately classified as falling under s. 92(14).

B. Step 2: Does the pith and substance respect the territorial limitations of the head of power?

[78] As the pith and substance of s. 11 is intangible, *Imperial Tobacco* mandates the Court to consider the relationships among the enacting territory, the subject matter of the legislation and the persons made subject to it, in order to determine whether the legislation, if allowed to stand, would respect the dual purposes of the territorial limitations in s. 92 (namely, to ensure that provincial legislation has a meaningful connection to the enacting province and pays respect to the legislative sovereignty of other territories): *Imperial Tobacco* at para. 36.

[79] I do not agree with the Applicants' submission that the pith and substance of s. 11 is to legislate in respect of property and civil rights of other governments without a meaningful connection to British Columbia, and to arrogate to British Columbia rights properly belonging to other sovereign governments.

[80] This proceeding has no legal impact on other governments unless and until it is certified as a class proceeding under the *CPA.* While s. 11(1)(b) authorizes the Province to bring an action on behalf of other governments, the legal impact of this decision is only made real through the court's decision to certify the action as a class proceeding under the certification test set out in s. 4 of the *CPA*. At that point, other governments will have a choice as to whether to remain in or opt out of the proceeding. If they choose to remain in the proceeding, they will be subject to British Columbia procedural law in the same manner as if they initiated participation in legal proceedings in BC of their own accord.

[81] Whether one reads the combined scheme of s. 11(2) of the *ORA* and s. 16(1) of the *CPA* as an “opt-out” (the Applicants’ submission) or a de facto “opt-in” (the Province’s submission) regime, the preservation of the litigation choice of other putative class member governments to participate in the BC action substantially negates the Applicants’ concern that s. 11 unconstitutionally trespasses on the legislative powers of foreign governments.

[82] The Province has invited me to consider that no Canadian government has voiced opposition to either s. 11 of the *ORA* or the Province’s intention to certify this action as a class proceeding on behalf of all other governments as class members. On this point, however, I agree with the Applicants that I should not resort to the stated positions of other governments as having relevance to the *vires* of the legislation in this case.

[83] Nevertheless, I find that the pith and substance of the legislation is “in the Province” in that it is aimed at regulating a proceeding brought by the Province in the courts of British Columbia. The Applicants are all defendants in a British Columbia court action. They may bring applications challenging the court’s assumption of jurisdiction over them, or the constitutional applicability of the *ORA* to their circumstances if they choose, but these concerns are distinct from the constitutional validity of s. 11.

[84] While s. 11 of the *ORA* may have substantive effects on the litigation options of other governments in relation to opioid-related wrongs, it does not undermine the substantive rights of other governments to pursue causes of action for opioid-related costs or damages. It merely provides a right of other governments to participate in the adjudication of those claims in the current proceeding in British Columbia. I find that any extraterritorial impacts of the *ORA* on the jurisdiction of other governments are incidental to its valid purpose and do not raise sufficient constitutional concerns to justify an infringement of the *vires* of the legislation: *Lacombe* at para. 36; *Imperial Tobacco* at para. 28.

[85] I agree with the Province that any residual concerns about the constitutionality of the model being applied are of applicability, not validity, and can be dealt with through the discretion of the court at certification to draft appropriate orders that respect the legislative authority and participatory choices of other governments: *British Columbia v. Imperial Tobacco Canada Ltd.,* 2006 BCCA 398 at paras. 46-51, leave to appeal to SCC ref'd, [2006] S.C.C.A. No. 445.

[86] While the Applicants argue that an unconstitutional law cannot be saved through the workaround of executive discretion (citing the example of mandatory victim fine surcharge addressed in *R. v. Bourdreault,* 2018 SCC 58 at para. 92), I do not agree that this is the situation here since s. 11(1)(b) will not force foreign governments to remain in the class if they assert their right to participate to opt out at certification.

[87] I therefore find that any extraterritorial aspects of s. 11 of the *ORA*, if any, are incidental to its pith and substance, being the creation of a procedural mechanism to presumptively authorize the Province to act as a plaintiff in *ORA*-related proceedings on behalf of other Canadian governments. The procedural mechanism in s. 11 of the *ORA* respects the limits of provincial legislative power under s. 92(14), or alternatively s. 92(13), of the *Constitution Act, 1867,* and is not invalid by reason of extraterritoriality. Given my findings above, I find that the pith and substance of s. 11 of the *ORA* is "in the Province" within the meaning of s. 92 of the *Constitution Act, 1867*.

IX. CONCLUSION

[88] The Applications for an order that this matter is suitable for summary trial under R. 9-7 of the *Supreme Court Civil Rules* are granted.

[89] The Applications for a declaration of constitutional invalidity of s. 11 of the *ORA* as being *ultra vires* the Legislature and no force and effect pursuant to s. 52 of the *Constitution Act, 1982* are dismissed.

[90] The Province is entitled to its costs on these Applications in any event of the cause.

"Brundrett J."